



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-141268-11]

RIN 1545-BK73

Allocation of Earnings and Profits in Tax-Free Transfers from One Corporation to Another

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 312 of the Internal Revenue Code (Code). The proposed regulations clarify the regulations under section 312 regarding the allocation of earnings and profits in tax-free transfers from one corporation to another. The proposed regulations affect corporations involved in these transfers and their shareholders.

DATES: Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-141268-11), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-141268-11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Submissions may

also be sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-141268-11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stephanie D. Floyd at (202) 622-7930 or Isaac W. Zimbalist at (202) 622-7550 (not toll-free numbers); concerning submissions of comments and/or requests for a public hearing, Oluwafunmilayo (Fumni) Taylor, at 202-622-7180.

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to 26 CFR part 1 concerning the allocation of earnings and profits in tax-free transfers from one corporation to another. The IRS has historically interpreted the regulations under section 312 as providing that the earnings and profits of the transferor corporation do not move to the transferee in whole or in part other than in a transfer described in section 381 or, to the extent provided under §1.312-10, in a divisive reorganization. Furthermore, the IRS has interpreted the regulations to provide that in a corporate reorganization described in section 381, the acquiring corporation, as defined in §1.381(a)-1(b)(2), succeeds to the full earnings and profits account of the transferor corporation. Thus, the earnings and profits account is not divided if the acquiring corporation in an acquisitive asset reorganization subsequently transfers target assets to one or more controlled subsidiaries. Practitioners have suggested that this result may be unclear under current law. See §1.381(c)(2)-1(d) (providing that where part of the acquired assets is transferred to one or more controlled corporations, or all of the acquired assets are transferred to two or more controlled corporations, the allocation of earnings and profits

is made without regard to section 381); §1.312-11(a) (providing for proper adjustment and allocation of earnings and profits with respect to asset transfers in connection with reorganizations, and cross-referencing the section 381 regulations for specific rules).

Consistent with the longstanding administrative position, the proposed regulations clarify that, except as provided in §1.312-10, if property is transferred from one corporation to another and no gain or loss is recognized, no allocation of the earnings and profits of the transferor is made to the transferee unless the transfer is described in section 381(a). The proposed regulations further clarify that, in a transfer described in section 381(a), only the acquiring corporation, as defined in §1.381(a)-1(b)(2), succeeds to the earnings and profits of the distributor or transferor corporation (within the meaning of §1.381(a)-1(a)).

The IRS and Treasury Department believe the proposed rule is appropriate because earnings and profits measures the capacity of a corporation to pay dividends to its shareholders and the corporation that has an interest, directly or indirectly, in all of the target's assets has the dividend-paying capacity that is most comparable to that of the target. Further, the IRS and Treasury Department believe the rules for the allocation of earnings and profits should conform to the rules for the allocation of other tax attributes under section 381.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed

regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Stephanie D. Floyd of the Office of Associate Chief Counsel (Corporate). Other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.312-11 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

§1.312-11 Effect on earnings and profits of certain other tax-free exchanges, tax-free distributions, and tax-free transfers from one corporation to another.

(a) In a transfer described in section 381(a), the acquiring corporation, as defined in §1.381(a)-1(b)(2), and only that corporation, succeeds to the earnings and profits of the distributor or transferor corporation (within the meaning of §1.381(a)-1(a)). Except as provided in §1.312-10, in all other cases in which property is transferred from one corporation to another and no gain or loss is recognized (or is recognized only to the extent of the property received other than that permitted to be received without the recognition of gain), no allocation of the earnings and profits of the transferor is made to the transferee.

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(e) Effective/Applicability date. Paragraph (a) of this section applies to transactions occurring on or after the date of publication of the Treasury decision adopting this rule as a final regulation in the **Federal Register**.

§1.381(c)(2)-1(d) [Removed]

Par. 3. Section 1.381(c)(2)-1(d) is removed.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

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